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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. KENNETH MCBILES, Appellant.	)	2 CA-CR 2011-0152 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GREENLEE COUNTY

Cause No. CR2008020

Honorable Monica Stauffer, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Myles A. Braccio — Phoenix
Attorneys for Appellee

Lynn T. Hamilton — Mesa
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Kenneth McBiles was convicted after a jury trial of possession of a dangerous drug for sale, possession of a narcotic drug, possession of marijuana, two counts of possession of drug paraphernalia, driving while impaired to the slightest degree, and driving with a drug or its metabolite in his system. The trial court sentenced him to presumptive, concurrent prison terms, the longest of which is ten years. McBiles asserts on appeal that the trial court erred in denying his motions to suppress, arguing he was arrested without probable cause and did not waive his right to remain silent after being given warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). We affirm.

¶2 When reviewing a trial court's denial of a motion to suppress, we review only the evidence presented at the hearing on the motion to suppress, *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996), and we view it in the light most favorable to sustaining the court's ruling. *State v. Rosengren*, 199 Ariz. 112, ¶ 2, 14 P.3d 303, 306 (App. 2000). In March 2008, Arizona Department of Public Safety Officer Eric Ellison saw McBiles driving a truck in excess of the posted speed limit. After Ellison activated his emergency lights, McBiles initially failed to stop, instead stopping approximately one mile away after speeding into a parking lot and travelling down a side street. McBiles then "jumped out of the front of his pickup truck" and began moving away from Ellison. Ignoring Ellison's orders to stop, McBiles attempted to toss a large plastic bag over a nearby wall. But the wind blew the bag toward Ellison and it landed at his feet. Several small plastic baggies containing a crystalline substance that Ellison believed to be methamphetamine fell from the bag as it landed. Ellison then placed McBiles under arrest.

¶3 Ellison advised McBiles of his rights pursuant to *Miranda*, and McBiles stated he understood his rights and would answer questions "as long as he felt that it would not incriminate him[]." After transporting him to jail, Ellison again advised McBiles of his rights, and McBiles repeated that he understood his rights and would answer questions "if he felt that it would not incriminate him[]." Ellison then conducted a drug recognition evaluation (DRE) of McBiles, during which McBiles answered several questions, admitting that he was a "narcotic addict," but "didn't feel like he was impaired at the time, [but] that he was only coming down from a high."

¶4 Before trial, McBiles filed motions to suppress arguing the drugs seized following his arrest should be precluded from evidence because Ellison had lacked probable cause to arrest him and his statements to Ellison during the DRE should be precluded because he had not waived his right to remain silent after being advised of his rights. The trial court denied those motions after an evidentiary hearing. On appeal, we review the court's denial of a motion to suppress evidence for an abuse of discretion to the extent it involves a discretionary issue, but we review constitutional and legal issues de novo. *See State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶5 McBiles asserts Ellison lacked probable cause to arrest him because he had only "a hunch or suspicion the bag contained drugs" because he "had not held, touched, nor smelled the substance" contained in the baggies, "closely observed the bags," or conducted a field test of the substance in those baggies. A police officer may make a warrantless arrest if "the officer has probable cause to believe" that "[a] felony has been committed and probable cause to believe the person to be arrested has committed the

felony." A.R.S. § 13-3883(A)(1). "'Probable cause is something less than the proof needed to convict and something more than suspicions.'" *State v. Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d 571, 576 (App. 2005), *quoting State v. Howard*, 163 Ariz. 47, 50, 785 P.2d 1235, 1238 (App. 1989). An officer has probable cause "'when reasonably trustworthy information and circumstances would lead a person of reasonable caution to believe an offense has been committed by the suspect.'" *Spears*, 184 Ariz. at 284, 908 P.2d at 1069, *quoting State v. Moorman*, 154 Ariz. 578, 582, 744 P.2d 679, 683 (1987).

¶6 We reject McBiles's argument. Ellison testified that, based on his training and experience, the crystalline substance in the baggies that had spilled from the plastic bag appeared to be methamphetamine and that the baggies were consistent with how methamphetamine is often packaged. McBiles cites no authority, and we find none, suggesting that an officer may not rely on such training and experience in recognizing illegal drugs and their typical packaging as the basis to make an arrest. And McBiles's attempt to discard the bag as Ellison approached further would support a conclusion the bag contained contraband. *See Redmon v. United States*, 355 F.2d 407, 411 (9th Cir. 1966) (agents had probable cause to arrest when "agents saw appellant throw an object, which they had previously seen in appellant's right hand, over the fence and which they all identified as a white or tan object containing a powdery substance").

¶7 McBiles also argues his statements to Ellison that he would answer questions "as long as he felt that it would not incriminate him[]" constituted an invocation of his right to remain silent and only demonstrated "his willingness to provide non-incriminating information such as [his] name, address, [tele]phone [number] and the

like."[1] After law enforcement advises a suspect of his or her right to remain silent, if that "'individual indicates *in any manner*, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease.'" *State v. Szpyrkra*, 220 Ariz. 59, ¶ 4, 202 P.3d 524, 526 (App. 2008), *quoting Miranda*, 384 U.S. 473-74 (emphasis in *Szpyrka*). "The test for whether a suspect's invocation is sufficiently clear is an objective one." *Id.*

¶8 But we agree with the state that McBiles's statement cannot reasonably be interpreted as an invocation of his right to remain silent. Indeed, his statement indicated his willingness to answer questions based solely on his own determination of whether his answers would incriminate him. Our supreme court reached the same conclusion based on a similar statement in *State v. Amaya-Ruiz*, 166 Ariz. 152, 800 P.2d 1260 (1990). There, when the defendant was asked if he wished to answer questions, he responded that "I don't know if I will answer them . . . ask me something." *Id.* at 166, 800 P.2d at 1274. Our supreme court found that statement to be an "unambiguous waiver" of the right to remain silent. *Id*. at 167, 800 P.2d at 1275. McBiles's response here is not meaningfully distinguishable.

[1]To the extent McBiles suggests he also did not waive his right to counsel, he did not raise this claim below and does not develop it meaningfully on appeal; accordingly, we do not address it further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening briefs must present argument containing appellant's contentions with citations to authorities and record); *see also State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (argument waived when neither developed properly nor supported by authority). For the same reasons, we do not address any claim that McBiles did not waive his right to remain silent during questioning by other law enforcement officers.

¶9 For the reasons stated, we conclude the trial court did not abuse its discretion in denying McBiles's motions to suppress. We therefore affirm his convictions and sentences.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge